IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

FRIDAY, THE 20TH JULY 2007 / 29TH ASHADHA 1929

SA.No. 528 of 1994(D)

(AGAINST THE DECREE DTD. 28/10/1993 IN A.S.59 OF 1991 OF THE DISTRICT COURT, THODUPUZHA FROM THE DECREE DTD. 22/2/1991 IN OS.326/1981 OF THE THODUPUZHA MUNSIFF'S COURT)

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APPELLANTS:APPELLANTS:DEFENDANTS 1 TO 3:

***1. THOMAN JOSEPH @ KUNJU KOCHI, VARIKKAMACKAL HOUSE, MUTTOM KARA, .DO....VILLAGE, THODUPUZHA TALUK.(DIED) LR'S IMPLEADED:**

2. GEORGE, VARIKKAMACKAL HOUSE, MUTTOM KARA, ...DO.... VILLAGE NOW RESIDING AT MUDURAKOOP ESTATE, ARACKADU KARA, ..DO... VILLAGE, MARKARA TALUK, COORGU DISTRICT.

3. JOSEPH, S/O.JOSEPH, VARIKKAMACKAL HOUSE, MUTTOM KARA, ...DO... VILLAGE, THODUPUZHA TALUK.

***ADDL.APPELLANTS 4 TO 11 ARE IMPLEADED:**

A4. MARY (D/O.LATE THOMMAN JOSEPH) W/O.JOY, IYPAMPARAMPIKUNNEL HOUE, P.O. CHALAKUDY.

A5. THOMAS, (S/O.LATE THOMMAN JOSEPH), VARIAKAMAKAL HOUSE, VETTILAPPARA P.O., PINDIMANA.

A6. SUNNY JOSEPH, (S/O.LATE THOMMAN JOSEPH), VARIAKAMAKAL ESTATE, P.O.AREKADU, SIDHAPUR – COORGE, KARNATAKA STATE.

A7. JOSEPH KURIEN, (S/O.LATE THOMMAN JOSEPH), VARICKAMAKKAL, VETTILAPPARA, PINDIMANA P.O., KOTHAMANGALAM.

.2/-

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A8. ELSY (D/O.LATE THOMMAN JOSEPH), W/O.BENNY, PONNATTU HOUSE, P.O. PURAPUZHA.

A9. JOSEPH MATHEW (S/O.LATE THOMMAN JOSEPH), VARICKAMAKAL HOUSE, VETTILAPPARA P.O., PINDIMANA.

A10. CELINE, (D/O.LATE THOMMAN JOSEPH), (W/O.CHARLES, KOTTARATHARA HOUSE, P.O.PAZHAYAMATTAM, THUNDANGANADU.

A11. ALICE (D/O.LATE THOMMAN JOSEPH), W/O.EDWARD, POOVATHUKKARAN, P.O.CHENGALOOR, CHALAKUDY.

(*ADDITIONAL APPELLANTS 4 TO 11 ARE IMPLEADED AS THE LRS OF DECEASED 1ST APPELLANT AS PER ORDER DTD. 23/10/98 IN C.M.P.NO.2202/1998)

BY ADV. SRI.V.GIRI

RESPONDENTS: RESPONDENTS:PLAINTIFFS:
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1. PARAMESWARAN NAMBOODIRI, KADAMARUKILLATH, MUTTOM KARA, ...DO.... VILLAGE, THODUPUZHA TALUK.

2. DEVAKI ANTHARJANAM, ...DO. HOUSE, ...DO... KARA, ...DO.... VILLAGE, ..DO.. TALUK.

BY ADV. SRI.T.R.HARIKUMAR)
SRI.V.G.ARUN) for R1 & R2

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD ON 20/07/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

ORDER ON C.M.P.NO.1025/1994 IN S.A.NO.528/1994

DISMISSED

20/07/2007 **SD/- M.SASIDHARAN NAMBIAR, JUDGE**

/TRUE COPY/

P.S.TO JUDGE

KSS

M.SASIDHARAN NAMBIAR,J.

S.A.NO.528 OF 1994

Dated, this the 20th day of July,2007

JUDGMENT

Defendants in O.S.326/1981 on the file of Munsiff Court, Thodupuzha are the appellants. Plaintiffs are the respondents. Respondents instituted the suit seeking a decree for permanent prohibitory injunction restraining appellants from obstructing their right of way over plaint C schedule pathway and from closing or locking the same and also for a declaration of their right of way by easement of prescription.

2. Plaint A schedule property measuring 3.67 acres is admittedly the residential property of respondents which was obtained by the father of first respondent under Ext.A1 partition deed dated 30.11.1952. Plaint B schedule property having an extent of 1.23 acres belongs to second appellant as per Ext.A5 registered sale deed dated 26.3.1976. Plaint C schedule property is the way claimed by

respondents leading from Thodupuzha-Moolamattom road and reaches the plaint A schedule property belonging to respondents. Respondents contended that the said way starts from Thodupuzha-Moolamattom road and passes westward through plaint B schedule property then takes a turn to the north from the western extremity of plaint B schedule property and reaches plaint A schedule property and that way has been continuously used by respondents and the predecessors for the last 75 years openly, peacefully and as of right and as an easement without any obstruction and thereby acquired a right of easement by prescription and appellants are not entitled to cause any obstruction to the way. The decree for declaration and permanent prohibitory injunction was later sought by amending the plaint. Appellants resisted the suit contending that respondents have no right of way through plaint schedule B property and plaint B schedule property was never used as a way to reach the house of respondents and the property

which lies to the west of plaint B schedule property was purchased by Vasudevan Nampoothiri in 1967 and before that Vasudevan Nampoothiri was residing in the property which lies to the south of the plaint B schedule property and father of Vasudevan Nampoothiri shifted his residence from there in 1969 and a pathway to the west in continuation of the road which was formed by vasudevan Nampoothiri to his house which was on the south of the plaint B schedule property was widened to a road pursuant to Ext.B3 agreement and respondents have no right of way over it and they have not prescribed any right of way and hence they are not entitled to a decree for declaration or injunction sought for.

3. Learned Munsiff on the evidence of Pws. 1 to 4, DWs. 1 to 7, Exts.A1 to A10, Ext.B1 to B3, Ext.X1 and X1(a) and C1 and C2, upheld the case of respondents and granted a decree declaring that respondents acquired a right of way by easement of prescription over plaint C schedule

pathway which is within the plaint B schedule property. Appellants were restrained by a decree for permanent prohibitory injunction from causing any obstruction to the respondents in using plaint C schedule pathway, including altering the present situation, or closing or locking the gate fitted at any portion of plaint C schedule pathway. Appellants challenged the decree and judgment before District Court in A.S.59/1991. Learned District Judge on reappreciation of evidence confirmed the findings of learned Munsiff. The learned District Judge has prepared a sketch of his own and appended it to the judgment and directed that the said sketch be part of the decree. Learned District Judge upholding the right of easement by prescription claimed by respondents held that respondents are entitled to plaint C schedule pathway which is shown as plot A B C D E P Q R S U V in the rough sketch appended to the judgment and thus confirmed the decree. The said decree and

judgment are challenged in the appeal.

4. Appeal was admitted on 16.8.1994. But substantial questions of law were not formulated. As substantial questions of law were not formulated, appellants and respondents were heard and the following substantial questions of law were formulated.

1) When as per order in I.A. 478/83 respondents were permitted to amend the plaint and they failed to incorporate the amendment in the original plaint, whether courts below were justified in relying on the copy of the amended plaint furnished by respondents for granting a decree on the basis of the said plaint?.

2) When a right of easement by prescription is claimed, is it not the duty of respondents not only to prove existence of the way, but user of the way for more than 20 years as of right and uninterruptedly and whether on the evidence courts below were justified in granting the decree declaring the right of easement of

prescription.?

5. Learned counsel appearing for appellants and respondents were heard on the substantial questions of law formulated.

6. Learned counsel appearing for appellants argued that under Rule 18 of Order VI of Code of Civil Procedure, when an order passed under Rule 17 permitting the amendment was not carried out in the original plaint the amendment so permitted has to be treated as not allowed and courts below should not have relied on the amended portion of the plaint and courts below have granted a decree basing on the pleading so amended, and therefore the decree and judgment granted by the courts below are unsustainable. Learned counsel also argued that plaint A B and C schedule property originally belonged to one and the same family and therefore till it was partitioned, respondents or their predecessors cannot prescribe any right of way over their own property and there is no pleading or acceptable

evidence on record to prove that plaint C schedule pathway was being used as a way openly, peacefully and continuously without interruption and that too as of right and as a right of easement thereafter and in such circumstance, courts below should not have granted the decree. It was further argued that courts below omitted to take note of Ext.B3 agreement which establishes that the road from the eastern public road reaching the house of DW2, upto the house H2 marked in the plan was formed only 1978 as provided under the agreement and it establishes that there was no way existing till then to the west of the house where now Sakthi Theatre is standing or to the plaint A schedule property and therefore courts below were not justified in granting the decree.

7. Learned counsel appearing for respondents argued that after allowing I.A.478/1983 permitting respondents to amend the plaint, an amended plaint as such was produced before the

trial court, though amendment was not carried out in the original plaint, and court fee on the amended relief sought for was also paid and was received by the court and the suit was posted for filing additional written statement and additional written statement was also filed by the appellant and the court proceeded on the basis that plaint was amended and first appellate court considered this aspect in the proper perspective and found that that it is to be taken that plaint was amended and in such circumstance, findings of courts below are perfectly correct and is not to be interfered on technical reasons. Counsel also argued that trial court and first appellate court analysed the evidence in detail, including Ext.B3, and found that plaint C schedule pathway has been in existence and have been continuously used by respondents and their predecessors to reach plaint A schedule property, where their residential house is situated, from the eastern

public road and that factual finding arrived concurrently by the courts below cannot be interfered in exercise of the powers of this court under section 100 of Code of Civil Procedure. It was further argued that it is not for this court to reappreciate the evidence and substitute the findings of this court to the factual finding of the trial court and the first appellate court and in such circumstance the appeal is only to be dismissed.

8.Certain facts are not in dispute at all. They are detailed in para 12 of the judgment of first appellate court. Plaint A schedule property, where respondents are residing, and plaint B schedule property, subsequently purchased by appellants, and the property which lies further to the south belonging to third appellant where Moolamattaom Sakthi theatre was constructed and the property which lies to the east of the property of the second appellant, belonging to DW6, were originally belonged to

the family of respondents. The family properties of respondents were divided under Ext.A1 partition deed in 1952. Therefore till 1952, respondents and their predecessors were joint owners of the entire properties including plaint A B and C schedule properties. In such circumstance, respondents could not have prescribed a right of way by easement of prescription till 1952 and the right could eminate only after 1952. According to respondents, the previous usage continued without interruption subsequent to the partition of the properties under 1952 partition also. The suit was originally instituted only for a permanent prohibitory injunction. Plaint was subsequently amended twice. The first amendment was allowed as per order in I.A.478/1983. Respondents were permitted to amend the plaint incorporating an additional relief of declaration of the right of way by easement of prescription and also for incorporating necessary pleadings. This

petition was seen allowed on 22.7.1983. Respondents were directed to carry out the amendment. The suit was posted for payment of additional court fee. The proceeding paper shows that on 5.9.1993, trial court recorded that, the amended plaint was filed and additional court fee was also received. It was thereafter suit was posted for filing additional written statement. Appellants thereafter filed an additional written statement on 10.10.1983. The suit was posted for framing additional issues. As necessary issues were already framed, no additional issue was framed. Therfore it is clear from the proceedings of the trial court that the amendment allowed by the court as per order in I.A.478/83, was treated as incorporated by filing of an additional amended plaint as such by the respondents and it was treated as the proper amendment by the trial court. In fact respondents paid additional court fee, in view of the amendment and appellants also proceeded with

the suit on the basis that plaint was amended. Additional written statement was also filed disputing the claim so incorporated by the amended plaint. It is much thereafter, respondents filed I.A. 27/1991, another application under Order 17 Rule VI of C.P.C. It was also seen allowed by the court on 1.12.1991. It is seen incorporated in the original plaint also. In such circumstances, first appellate court rejected the contention of appellants that, as the amendment was not incorporated in the original plaint it is to be treated that there is no amendment to the plaint and therefore the decree granted on the basis of the amended plaint cannot be challenged for that reason.

9. True, Rule 18 of order VI of C.P.C. which was omitted by the Amendment Act 46 of 1999 which was in force at that time provided that if a party who has obtained an order for leave to amend the pleading does not amend accordingly within the time limited, for the purpose by the

order, or if no time is thereby limited then within fourteen days from the date of the order, shall not be permitted to amend after the expiration of such limited time as aforesaid or of such fourteen days, as the case may be, unless the time is extended by the court. Therefore the effect of Rule 18, is that if the amendment allowed under Rule 18 of Order VI was not carried within the time or extended time granted, has to be treated as not available to the party. But as rightly found by the first appellate court, in the factual situation of the present case it is clear that when respondents instead of physically carrying out the amendment in the original plaint, presented an amended plaint before the court,with the amendments incorporated and court has also treated it as an amendment incorporated in the original plaint, as provided under Rule 18. It was accepted by the court and additional court fee was also paid . Suit was then posted for for filing

written statement. If there was no amendment in view of Rule 18 of Order VI as the amendment was not incorporated there was no necessity to post the case for additional written statement for appellants to file an additional written statement. By their conduct, appellants also proceeded on the basis that the amendment has already been carried out as provided under Rule 18 of Order VI of Code of Civil Procedure by furnishing an amended copy of the plaint. In such circumstance, I do not find the failure to carry out the amendment in the original plaint is fatal. The finding of first appellate court on that aspect is perfectly correct.

10 .Then the question is whether on the evidence finding of the courts below that respondents established a right of easement by prescription over plaint C schedule property is correct. It is a factual finding rendered by the courts below on appreciating the evidence. Courts below, found that Moolamattom public road

lies to the east of the whole properties and it runs north south. It is from that public road, the disputed way starts and runs through plaint B schedule property towards west and then turns towards the north and reaches plaint A schedule property. Disputed portion of that way starts from the road and and runs to the west through plaint B schedule property and to the south of the property of DW6 and then turns north. The disputed portion of that way reaches the house of respondents in plaint A schedule property. Court below on evidence found that at the starting point it is now a road and that road now runs towards the west through the plaint B schedule property, with the house of DW2. But the way turns to the north at the western boundary of the plaint B schedule property and thereafter proceeds towards the west and at the place where there is a rock it turns to the north and finally reaches plaint A schedule property.

11. The dispute is only with regard to the portion of plaint C schedule way leading from the eastern public road up to the western side of the plaint B schedule property, where it turns towards the north. Learned Munsiff and learned District Judge on appreciating the evidence found that the way is continuously being used by the respondents and their predecessors to reach the plaint A schedule property where they resides openly, peacefully, continuously without interruption as of right. Though appellants contended that there was no such way, analyzing the whole evidence, it was concurrently found that the way has been in existence. Exercising powers of this court under section 100 of Code of Civil Procedure, evidence cannot be reappreciated to substitute the findings of courts below with the findings of this court. Learned counsel appearing for appellants argued that courts below omitted to take note of the relevancy of Ext.B3 agreement, whereunder DW2 and

the second appellant exchanged property whereunder the existing road till then reached the house, where Vasudevan Nampoothiri the predecessor in interest of DW2 was originally residing and the way was widened by the portion of the property given by the appellants. It was argued that and Ext.B3 shows that there was no such way in existence and if it was appreciated in the proper perspective, courts below would not have arrived at a finding that plaint C schedule way is being used by respondents and their predecessors for the requisite period to uphold the claim of right of easement by prescription. As rightly pointed out learned counsel appearing for respondents , Ext.B3 by itself does not either prove or disprove existence of plaint C schedule way. On the other hand, admission of appellants themselves, in the written statement shows that a way was available from the eastern road upto the house, which was subsequently constructed by Vasudevan

Nampoothiri , father of DW2, in the property which lies further to the west of plaint C schedule way. Evidence of DW2 is sufficient to hold that when Vasudevan Nampoothiri died at Trivandrum the dead body was taken to the house, which is situated further to the west of plaint C schedule way, in a vehicle from Thiruvananthapuram. At best it only prove that vehicular road was not available to the house of DW2 prior to 1969. But it does not prove that there was no way. In such circumstance, by relying on Ext.B3, appellants cannot argue the appreciation of evidence by courts below was perverse or not proper. Analysing the entire evidence, I find no reason to interfere with the findings of courts below that respondents and their predecessors have been using plaint C schedule way, which starts from the eastern public road and passes through plaint B schedule property and turns to the north touching the western boundary of plaint B schedule property

and run towards north and reaches plaint A schedule property. Evidence establish that, though plaint C schedule way forms part of joint family property, after the partition in 1952 the predecessors of the respondents and then respondents have been using that pathway as of right and as aneasement openly, peacefully and without interruption. On that evidence, courts below rightly granted a decree declaring that respondents have a right of way by easement of prescription of plaint C schedule pathway. Respondents are also entitled to the decree for declaration and injunction sought for.

12. Learned counsel appearing for appellants then pointed out that though trial court granted a decree only in respect of plaint C schedule property, appellate court granted a decree in respect of the entire road which starts from the eastern public road till it turns to the north eventhough right of way claimed was only for a width of only four feet. There is force in the

submission. Respondents have no case that they have prescribed a right of way over the road or over a way having width of more than 4 ft. through the plaint B schedule property. On the other hand, it was the specific case that they have been using plaint C schedule property, which is described as having a width of 4 ft. and they prescribed a right of way over that property. In such circumstance, first appellate court should not have granted a decree declaring the right of way over the entire width of plot A C D E P Q R S U V as marked by the first appellate court in the rough sketch prepared . Therefore the decree granted could only be as granted by the trial court, namely in respect of plaint C schedule property as described in the plaint.

The Second Appeal is therefore dismissed but making it made clear that respondents have a right of way over plaint C schedule property, as claimed in the plaint and not the entire road

portion now available to the house of DW2.

M.SASIDHARAN NAMBIAR
JUDGE

Tpl/-